

In The Matter Of:

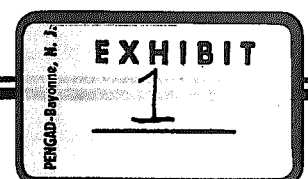
*ARY Jewelers, LLC v.
IBJTC Business Credit Corp., et al.*

*David Molinario
Vol. 1, December 1, 2004*

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[1] this lawsuit.

[2] Q: This is after he already had the contact
[3] information about Bob, correct?

[4] A: They are two separate situations.

[5] Q: Oh, I'm sorry. The second one he was
[6] calling you again in response to a phone call that
[7] Bob had made to him?

[8] A: I believe that's correct.

[9] Q: Did ya'll actually talk?

[10] A: Yes.

[11] Q: Tell me the generalities of that
[12] conversation.

[13] A: He gave me very general recollections of
[14] his experience with this company and told me that he
[15] was going to reach out and talk to Bob.

[16] Q: Do you know whether or not he had already
[17] talked to Bob once that several months ago?

[18] A: I don't know if they actually spoke. I
[19] believe they exchanged voice mails.

[20] Q: Do you recall at least generally what
[21] recollections he was relating to you about his
[22] experience with this company? And when we say "this
[23] company," who are you referring to?

[24] A: ARY.

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[1] ARY or certain individuals that may have some
[2] relationship with ARY, it's my understanding that
[3] you provided or faxed to the folks at Foothill while
[4] you were at Whitehall.

[5] Is that a fair recap of what you just
[6] described as news articles?

[7] A: News articles in the public domain, yes.

[8] Q: Let me ask you, I don't know of any news
[9] articles that are not in the public domain, but you
[10] offered that as though it's important to you.

[11] Am I hearing from you that there's some
[12] distinction or difference that the news articles —
[13] let me back up. If I need to repeat this, I will.

[14] Was everything else said in that statement defining
[15] the news articles, correct?

[16] A: I believe so.

[17] Q: Is there some important distinction in your
[18] mind as it pertains to this lawsuit that these news
[19] articles as you say were "in the public domain"?

[20] A: No. I believe your statement was correct,
[21] all news articles are in the public domain.

[22] Q: Again, Mr. Cole related to you news
[23] articles, as you recall, he said he played no role
[24] or an insignificant role in Foothill's decision

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[1] Q: Do you remember what he said generally?

[2] A: Yes.

[3] Q: What would that be?

[4] A: He indicated that they wanted to move
[5] forward with the transaction. ARY did not want to
[6] move forward with them. He also indicated that the
[7] articles they had received from Whitehall didn't
[8] really matter to him. There was a deterioration in
[9] the company's operating performance.

[10] Q: Anything else that you can recall?

[11] A: Yes.

[12] Q: You are doing good. Keep going.

[13] A: He indicated, again, that the articles
[14] played no impact in his decision and it would have
[15] been identified during normal course.

[16] Q: Let me kind of hopefully understand. What
[17] you just told me is important. I appreciate it.
[18] Let me kind of summarize, list and summarize what
[19] you recollect Mr. Cole was telling you about ARY or
[20] this potential ARY loan, and that is in no necessary
[21] order.

[22] One, the articles, and we're talking about
[23] some Internet or news articles and I guess maybe
[24] news articles taken off the Internet pertaining to

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[1] to — well, let, me back up.

[2] Let me ask you tell me what you understand
[3] he was saying on that point. It made no difference?
[4] I'm not trying to put words in your mouth.

[5] A: I don't recall nor understand completely
[6] because I don't understand the entire situation
[7] between ARY and Foothill.

[8] Q: That's fair enough. Something about news
[9] articles made no difference or played no role,
[10] something to that effect?

[11] A: Something to that effect.

[12] Q: Then something to the effect in the
[13] standard course of operating at Foothill, they would
[14] have come across these news articles anyway?

[15] A: I believe that was said, yes.

[16] Q: And then thirdly, something to the effect
[17] that you took from this conversation —

[18] MR. CARRIGAN: And we can get through this
[19] area and then take a break.

[20] MR. FISCHLER: Off the record.

[21] (Discussion off the record)

[22] Q: Thirdly, something to the effect that
[23] Foothill wanted to go forward with this loan or the
[24] transaction, but ARY did not want to go forward,

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[1] anything even remotely close to that ever cross your
[2] mind?
[3] **MR. FISCHLER:** Objection to form. Go
[4] ahead.
[5] **A:** The information was public information.
[6] Therefore, I did not believe that there was any
[7] confidentiality associated with it.
[8] **Q:** Sir, that was not my question. The
[9] question was did it ever cross your mind that what
[10] you were doing by faxing those articles to a
[11] competitor that had at least previously a loan
[12] proposal on the table to ARY that may still be on
[13] the table, did it ever cross your mind that that may
[14] be inappropriate based on whatever?
[15] **A:** I don't believe so. I don't know.
[16] **Q:** Did it bother you or even ring a little
[17] bitty alarm bell in your own personal business
[18] ethics that that may be inappropriate?
[19] **MR. FISCHLER:** Objection to the form.
[20] **A:** Again, I was just following the direction
[21] of my supervisor. I did not have an opinion on it
[22] one way or the other. I was doing what I was
[23] instructed.
[24] **Q:** That is not my question, sir. As you were

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[1] instructed to do this and at the time you did this,
[2] did you have even the slightest bit of concern or
[3] worry or thought or little bitty alarm bell in your
[4] mind go off that this may not be appropriate?
[5] **A:** I don't recall.
[6] **Q:** Last question before we break for lunch.
[7] Were you ever told by Frank O'Connor why it was that
[8] you were faxing these articles to a competitor that
[9] at least at one point in time you were aware had a
[10] competing proposal on the table to ARY?
[11] **A:** Yes.
[12] **Q:** What did Mr. O'Connor tell you?
[13] **A:** He told me it was a professional courtesy,
[14] that Foothill was awaiting our commitment letter,
[15] and he was concerned about litigious action on
[16] Foothill against us.
[17] **Q:** Did that all ring true and make sense to
[18] you?
[19] **A:** I believe it made sense.
[20] **Q:** Is it typical that you guys in your
[21] industry when you are competing for a loan, as a
[22] professional courtesy you share information with
[23] each other about your potential client?
[24] **MR. FISCHLER:** I object to the form of the

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[1] question. It mischaracterizes the record.
[2] **MR. CARRIGAN:** Objection form, period.
[3] **MR. FISCHLER:** That mischaracterizes the
[4] record.
[5] **A:** I lost track of the question now.
[6] **Q:** The question to you is, sir, how long have
[7] you been in this industry?
[8] **A:** Now?
[9] **Q:** Yes.
[10] **A:** Nine years.
[11] **Q:** Is it your understanding that for you guys
[12] in this industry, it's part of your professional
[13] courtesy to one another that you as competitors in
[14] the loan bidding process share information with each
[15] other as professional courtesy about potential
[16] clients?
[17] **MR. FISCHLER:** Objection to the form.
[18] **A:** That was the first time I can recall it
[19] happening. I can recall similar situations.
[20] **MR. FISCHLER:** You said last question a
[21] couple of questions ago, Steve. We have to break
[22] for lunch.
[23] **Q:** Last question. Do you agree with that,
[24] sir, that that is part of the professional courtesy

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[1] that you owe your competitors in this, your
[2] industry, to share information with one other about
[3] potential clients?
[4] **MR. FISCHLER:** Objection to the form.
[5] **A:** I don't know if I have an opinion on it. I
[6] was doing what I was instructed to do. If asked to
[7] do it again, I would do what I was instructed to do.
[8] **Q:** Would you ever do that on your own?
[9] **MR. FISCHLER:** Objection to the form.
[10] **A:** I would ask someone.
[11] **Q:** Because you have concerns over whether or
[12] not that is appropriate, don't you, sir?
[13] **MR. FISCHLER:** Objection to form.
[14] **A:** I don't know if it's concerns over what is
[15] appropriate or not. I would just seek additional
[16] counsel, as I do on many situations.
[17] **Q:** Why would you seek additional counsel?
[18] **MR. FISCHLER:** We have to cut this off.
[19] **MR. CARRIGAN:** I don't have to cut anything
[20] off.
[21] **MR. FISCHLER:** Well, I'm going to cut it
[22] off. The court reporter asked for a break. The
[23] witness is tired. We need to break for lunch.
[24] You've taken half hour breaks to use the phone.

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[1] Q: Which was in a sense as you pointed out —
[2] I mean, telling them why was the articles. Whether
[3] or not you had actually forwarded it to them, even
[4] if Frank O'Connor's recollection is clear, the why
[5] was the news articles. I'll strike all that.
[6] One way or the other, it's both of ya'll's
[7] recollection that he instructed you to inform
[8] Foothill why the letter of commitment was not being
[9] issued?
[10] A: Correct.
[11] Q: He told you that the purpose for doing
[12] this, this being at least the telephone call, if not
[13] also the faxing of the news articles to Foothill,
[14] was because Foothill was awaiting a commitment
[15] letter from Whitehall and — let me back up. That's
[16] what I'm trying to understand.
[17] Tell me one more time, based on what
[18] Mr. O'Connor told you, your understanding as to why
[19] Foothill was either being called and/or faxed with
[20] this information.
[21] A: Frank told me that it was a professional
[22] courtesy to call them and make them aware that
[23] either Foothill or ARY or Krigel's, I'm not sure who
[24] the proper entity would be, would not be receiving a

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[1] courtesy?
[2] A: Correct.
[3] Q: I think you told me earlier — well, I
[4] asked you does that make sense to you,
[5] Mr. Molinaro. I thought you said yes, it made
[6] sense to you. Do you recall that testimony?
[7] A: I'm unclear as to the questioning and
[8] answering.
[9] Q: My questioning and answering?
[10] A: I am a little confused now.
[11] Q: Let me ask you, your knowledge of the
[12] industry now, does that make sense that as a
[13] professional courtesy, Foothill, who at least at one
[14] time had its own loan proposal out on the table to
[15] Krigel/ARY, would be informed of Whitehall's
[16] decision not to go forward with their term sheet?
[17] A: I think the ARY situation is a unique
[18] situation. I can recall a couple of other
[19] situations where information was communicated
[20] between lenders that would be — I don't want to say
[21] somewhat consistent, but was communicated.
[22] Q: I guess you and I can agree that as a
[23] professional courtesy, or whatever you want to label
[24] it as, it is not common for potential lenders to

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[1] commitment letter solidifying our ability to move
[2] forward with the transaction.
[3] Q: You earlier told me that that made sense to
[4] you at least at the time. Help me. Why would
[5] Foothill need to know whether or not Whitehall was
[6] going to issue a letter of commitment to Krigel's
[7] and ARY?
[8] A: I don't think I can speak to why
[9] Foothill — I'm not sure if I understand the
[10] question. I think you are asking me to speak for
[11] Foothill. I'm not sure what you are asking.
[12] MR. FISCHLER: You want him to read the
[13] question back?
[14] MR. CARRIGAN: Let me redo it.
[15] Q: You told me that Mr. O'Connor informed you
[16] that the purpose of your calling and/or faxing
[17] Foothill with the information was that Foothill or
[18] now you say somebody was awaiting a commitment
[19] letter from Whitehall, and as a professional
[20] courtesy, Mr. O'Connor wanted you to make Foothill
[21] aware that they would not be receiving this letter
[22] of commitment, correct?
[23] A: Correct.
[24] Q: It was under the category of a professional

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[1] share information about their mutual potential
[2] clients; is that correct?
[3] A: I don't know how you define "common."
[4] There are situations where you do communicate.
[5] Q: You told me, one, ARY was a unique
[6] situation which allowed it and that you could think
[7] of a couple of other somewhat consistent situations
[8] where it also had been done under somewhat similar
[9] conditions or circumstances, correct?
[10] A: Correct.
[11] Q: It sounds to me like in your — how many
[12] years have you been in the industry again?
[13] A: Nine or so.
[14] Q: In almost nine or so years, you can only
[15] think of less than a handful of times where this has
[16] ever been done?
[17] A: That is correct. However, I've only been
[18] in a situation where I would be privy to this
[19] information for probably four years.
[20] Q: So in four years, you've only seen it less
[21] than a handful of times?
[22] A: That's probably a correct statement.
[23] Q: I mean, by anybody's definition, that
[24] sounds to me like the converse of that is it's

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[1] be a reasonable expectation on their part that
[2] whatever you uncover is kept with you?
[3] **MR. FISCHLER:** Objection.
[4] **Q:** Or your bank?
[5] **MR. FISCHLER:** The witness is not here as
[6] an expert witness.
[7] **THE WITNESS:** Do I answer?
[8] **MR. FISCHLER:** Go ahead. My objection is
[9] noted. If you have an opinion, you can go ahead and
[10] answer.
[11] **A:** My understanding of all that privacy
[12] information that you discussed is regarding
[13] confidential and private information that isn't in
[14] the general public domain.
[15] **Q:** Are you saying it would be an unreasonable
[16] expectation for one of your potential clients
[17] that — you think The Children's — who is your
[18] contact with The Children's Palace?
[19] **A:** It's The Children's Place.
[20] **Q:** Who is your contact with The Children's
[21] Place?
[22] **A:** Seth Udasin.
[23] **Q:** Would you spell the last name.
[24] **A:** U-d-a-s-i-n, I believe.

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[1] **Q:** U-d-i —
[2] **A:** U-d-a-s-i-n.
[3] **Q:** What is his ethnic background?
[4] **A:** I believe Jewish, but I'm not sure.
[5] **Q:** Where is he located?
[6] **A:** The company is located in Secaucus, New
[7] Jersey.
[8] **Q:** Do you think that Mr. Udasin knows that you
[9] think it's okay if it's in the "public domain" to
[10] share any information that you might have on him and
[11] The Children's Place with other financial
[12] institutions?
[13] **MR. FISCHLER:** Objection to form.
[14] **A:** I don't know the answer to that. It's a
[15] public company. They do have public information
[16] that's out there.
[17] **Q:** That's not what I asked. Do you think he
[18] think it would be okay — as long as David Molinaro
[19] deems it to be in the public domain, he doesn't mind
[20] you faxing news articles, picking up the phone and
[21] calling them, so on and so forth? Do you think he
[22] thinks that's okay?
[23] **A:** I don't know what his opinion would be.
[24] **Q:** Do you mind if I call him and ask him?

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[1] **A:** You can call him.
[2] **Q:** What's his telephone number?
[3] **A:** I don't know.
[4] **MR. FISCHLER:** I would object to you doing
[5] that. I would ask you to give me prior notice
[6] before any such call.
[7] **MR. CARRIGAN:** No.
[8] **MR. FISCHLER:** My request is on the record.
[9] If you don't want to honor it, that's your choice.
[10] You are on notice that I asked you not to do that.
[11] If you decide to do that, I ask you for prior
[12] notice.
[13] **MR. CARRIGAN:** That would be denied. You
[14] have not noticed me of any conversation with Cole or
[15] O'Connor or any of these individuals.
[16] **MR. FISCHLER:** You are suggesting I can't
[17] interview third-party witnesses without prior notice
[18] to you?
[19] **MR. CARRIGAN:** Are you suggesting I can't?
[20] **MR. FISCHLER:** I'm not suggesting you
[21] can't, but what you are proposing, if I understand
[22] you correctly, is not an interview with a third-
[23] party witness. It would be, in my view, an
[24] inappropriate and arbitrary contact with someone

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[1] that has nothing to do with this case.
[2] **MR. CARRIGAN:** Oh, you don't think so?
[3] **MR. FISCHLER:** We can talk about it at some
[4] future date if you so choose to do it. Let's just
[5] move forward.
[6] **MR. CARRIGAN:** Just so you know, I'm doing
[7] it, and I'm not contacting you beforehand. You
[8] didn't contact me when you contacted any of the
[9] witnesses you contacted.
[10] **Q:** Is that where The Children's Place is
[11] headquartered, Secaucus, New Jersey?
[12] **A:** Yes.
[13] **Q:** What is Mr. Udasin's position there?
[14] **A:** He's the CFO.
[15] **Q:** You knew there were some other bidders or
[16] loan proposals in the ARY mix, correct?
[17] **A:** I'm not 100 percent certain of how many or
[18] what proposals were out there.
[19] **Q:** You were aware of at least yours and one
[20] other?
[21] **A:** I was told that Foothill had made a
[22] proposal.
[23] **Q:** You certainly knew there may have been
[24] others, correct?

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[1] perfectly appropriate, correct, proper actions to
[2] take?
[3] A: Yes.
[4] Q: What has he said about that?
[5] A: He has said he feels as though we did not
[6] do anything wrong.
[7] Q: You mentioned these couple of other
[8] examples where some facts were kind of similar and
[9] analogous to the ARY situation. Was he involved in
[10] those other couple of situations?
[11] A: One out of the two.
[12] Q: I guess it just sounds to me like based on
[13] what he's telling you, if he was confronted with
[14] whatever uniqueness there was in this situation, it
[15] sounds like he wouldn't hesitate to do this type of
[16] thing again.
[17] MR. FISCHLER: Is that a question?
[18] MR. CARRIGAN: Yes.
[19] Q: Is that the impression you got?
[20] MR. FISCHLER: Objection to form.
[21] A: I can't answer for Frank.
[22] Q: Tell me about the one other somewhat
[23] analogous situation where some information along
[24] these lines was also communicated that Frank

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[1] O'Connor was involved in.
[2] A: There was a deep discount department store
[3] in I believe Missouri, Gibson's, where we were
[4] looking to take I believe at the time Fleet Retail
[5] finance out of the credit facility, refinance them
[6] out. Part of our structure included I believe
[7] lending on real estate.
[8] During due diligence, we had determined
[9] that the real estate had previously been gas
[10] stations where there were environmental concerns.
[11] As a result of that, we were not able to do the
[12] deal.
[13] I believe Frank O'Connor called Fleet
[14] Retail and informed them of what we had determined,
[15] and accordingly, we were not able to move forward.
[16] Q: Again, the potential client was who?
[17] A: Gibson's.
[18] Q: Are they still in business?
[19] A: They have subsequently been liquidated.
[20] Q: Fleet Retail would have been in the same
[21] situation as Foothill was in our situation? They
[22] were the existing financier, lender?
[23] A: Correct.
[24] Q: Do you know whether or not they also had a

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[1] term sheet at any time out to Gibson's to continue
[2] financing them?
[3] A: I don't know.
[4] Q: Do you know whether or not Fleet in that
[5] situation, Gibson's had given permission to Fleet —
[6] given permission to Frank O'Connor to pass that
[7] information on to Fleet Retail?
[8] A: I don't know.
[9] Q: You are not aware of any authorization from
[10] anyone at ARY to release or distribute the
[11] information that was distributed from Whitehall to
[12] Foothill, correct?
[13] A: I'm unaware of any of that.
[14] Q: And at no time either at the time of this
[15] incident or since this lawsuit or any time in
[16] between has Frank O'Connor taken the position with
[17] you that he had ARY's permission or authority to
[18] release this information, correct?
[19] A: That's correct, I'm not aware of that.
[20] MR. FISCHLER: This information being the
[21] articles?
[22] Q: The articles, the fact that the decision,
[23] private decision had been made to reject the loan
[24] application, withdraw it, and the reasons why it was

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[1] rejected or withdrawn.
[2] A: I don't believe he had the authority. I
[3] don't know that.
[4] Q: He never took that position with you?
[5] A: No.
[6] Q: You are not aware of anything that would
[7] indicate he had that authority?
[8] A: That's correct.
[9] Q: Would you tell me real quickly, with
[10] appreciation, about the one other situation. I
[11] understand and agree with you that the Fleet Retail
[12] and Gibson's was certainly somewhat analogous. What
[13] was the one other one that came to mind? Let me
[14] back up. Fleet Retail/Gibson's, was that after ARY?
[15] A: Yes.
[16] Q: Were ya'll with Whitehall at the time?
[17] A: We were with LaSalle.
[18] Q: Do you know whether or not those
[19] environmental reports were actually faxed over or
[20] forwarded or distributed to Fleet Retail?
[21] A: I don't know.
[22] Q: Tell me about the one other situation.
[23] A: Probably about six to nine months ago, I
[24] think it was, we were looking at a credit facility

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[1] U.S.A. Drug in Arkansas. We were taking out I think
 [2] Fleet Capital, and we were competing on a parallel
 [3] basis with another financial institution. I believe
 [4] it was led by GE, General Electric.
 [5] At some point in time, we elected not to
 [6] move forward with the credit facility, and I believe
 [7] that was communicated to GE.
 [8] Q: I appreciate that. The potential borrower
 [9] was U.S.A. Drug?
 [10] A: That's correct.
 [11] Q: They are based out of?
 [12] A: Arkansas, I believe.
 [13] Q: You are aware, and were aware, that there
 [14] were at least two competing financial institutions,
 [15] if I have it right. Who were you with at the time?
 [16] A: Wells Fargo Retail Finance.
 [17] Q: Who else was involved from Wells Fargo
 [18] other than yourself?
 [19] A: Tim Tobin.
 [20] Q: Wells Fargo had a term sheet on the table
 [21] as did you believe GE Capital, or GE?
 [22] A: GE definitely did.
 [23] Q: And Wells Fargo did?
 [24] A: Yes.

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[1] Q: I got lost. Fleet Capital was the existing
 [2] lender?
 [3] A: Correct.
 [4] Q: What did you mean "parallel," meaning just
 [5] competing?
 [6] A: Usually when there's a process where you
 [7] compete against someone else, it makes sense to do
 [8] everything parallel so you don't expend extra money
 [9] during the due diligence process, and we were
 [10] competing with GE.
 [11] Q: It sounds like at least one potential
 [12] difference, if I'm understanding you, is it was more
 [13] out in the open who was also looking at the
 [14] possibility of loaning the money to U.S.A. Drug?
 [15] A: Yes.
 [16] Q: And, in fact, ya'll were at least sharing
 [17] some of the expenses of the due diligence?
 [18] A: Correct.
 [19] Q: Which that is a difference from the ARY
 [20] situation as you understand it, correct?
 [21] A: I believe that is different.
 [22] Q: LEF and the due diligence that you were all
 [23] doing, expense or otherwise, until the faxing of
 [24] this information was not shared?

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[1] A: I don't believe so.
 [2] Q: At some point in time, Wells Fargo made the
 [3] decision that ya'll were not going forward, and that
 [4] was communicated to GE?
 [5] A: Correct.
 [6] Q: Do you know whether or not that was done
 [7] with or without U.S.A. Drug's permission?
 [8] A: I don't know the answer to that. However,
 [9] U.S.A. Drug was aware of it.
 [10] Q: Was aware that it was being done?
 [11] A: Yes.
 [12] Q: Let me ask you, are you aware of any notice
 [13] either before or after this information, as you and
 [14] I have been kind of defining it and putting it in
 [15] parameters, was forwarded to or communicated to
 [16] Foothill that anyone at Whitehall put ARY on notice
 [17] that this was either going to be forwarded or had
 [18] been forwarded?
 [19] A: I don't understand the question.
 [20] Q: Sorry. Are you aware of any notice either
 [21] pre-faxing or post-faxing that was given to ARY that
 [22] this information either was going to be or had been
 [23] forwarded to Foothill?
 [24] A: I'm not aware of anything.

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[1] Q: You have not heard at any time either back
 [2] at that time or postlawsuit or at any time in
 [3] between Frank O'Connor take the position that he put
 [4] ARY on notice of the distribution of this
 [5] information either pre-faxing or post-faxing?
 [6] A: I don't believe Frank has ever mentioned
 [7] that to me.
 [8] Q: Do you remember who the contact was with
 [9] U.S.A. Drug?
 [10] A: I don't.
 [11] Q: How about at GE, were who were ya'll
 [12] dealing with?
 [13] A: I don't know. That I could probably get
 [14] more easily than the other one.
 [15] Q: If you come across it, would you mind
 [16] passing it on to Bob, and Bob and I can decide
 [17] whether or not I can get that.
 [18] Quickly, how about with Fleet Capital, do
 [19] you remember the contacts or anyone?
 [20] A: I never spoke to Fleet Capital.
 [21] Q: Where are they located?
 [22] A: I don't know.
 [23] Q: How about to go into the Gibson's example
 [24] real quick, do you have any recollection?